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MUNICIPAL SEGREGATION ORDINANCES.—The so-called segregation ordinances provide for the separation of the white and colored races in the residential sections of certain Southern cities having a large negro population. This is effected principally by prohibiting the members of one race from moving into and occupying as places of abode or public assembly, houses, in a block in which all, or a majority of the houses, are occupied by those of the other race. Their purpose is to prevent the too close association of the races and the resulting breaches of the peace, immorality and dangers to health. Not only is this a question of great importance throughout the South, but the ordinances themselves being somewhat novel in their nature give rise to some very interesting legal questions, and they have been the subject of much comment.[1] Their validity has been passed upon by the supreme courts of five states: Maryland, North Carolina, Georgia, Kentucky and Virginia.

What seems to have been the first of these ordinances was passed by the Baltimore city council in 1911. This was done in exercise of the general police power of the city council, and prohibited members of either race from moving into blocks occupied exclusively by members of the other race; but left blocks which at the time of

[1] See 1 Va. L. Rev. 333; 2 Va. L. Rev. 82; 62 Penn. L. Rev. 312; 63 Penn. L. Rev. 895; 25 Yale L. J. 81; 12 Mich. L. Rev. 215; 13 Mich. L. Rev. 599; 11 Col. L. Rev. 24; 15 Col. L. Rev. 545; 27 Harv. L. Rev. 270; 18 Va. L. Reg. 561; 1 Va. L. Reg. (N. S.) 330; 3 Natl. Mun. Rev. 496; 47 L. R. A. (N. S.) 1087; Ann. Cas. 1915B, 957.

the passage of the ordinance were occupied by members of both races entirely free for the same kind of occupancy. The court held [2] that this was an object which properly admitted of the exercise of the police power of the municipality; and that, since it operated in precisely the same way on one race as it did on the other, it was not discriminatory under the Fourteenth Amendment.[3] This ordinance contained no clause protecting vested rights existing at the time of its passage, and the court said that it would prohibit one who owned a house in a block occupied exclusively by members of the other race from moving into his own house; and that therefore, although the court recognized the fact that the absolute control of private property might be subject to regulation under the police power, yet these provisions *as they were passed* were too unreasonable to permit the court to assume that the legislature intended to confer on the municipality the power to thus affect vested rights. The court refused to say whether the state legislature could have passed a valid enactment similar to the one in question. The language of the opinion seems to indicate that it heartily favored the policy of the ordinance, and would have held it valid if it had contained a clause protecting rights already vested.

The Supreme Court of North Carolina considered the validity of an ordinance passed by the board of aldermen of the city of Winston in pursuance of its power to provide for the general welfare of its citizens. The ordinance made it unlawful for a member of one race to occupy as a residence a house in a block where a majority of the residences were occupied by those of the other race. In a rather obscurely reasoned opinion [4] the court said that if the city council could segregate the whites and the blacks it could likewise segregate the Republicans and Democrats or the Protestants and Catholics; [5] that the ordinance unduly interfered with the *jus*

[2] State *v.* Gurry, 121 Md. 534, 88 Atl. 546, 47 L. R. A. (N. S.) 1087, Ann. Cas. 1915B, 957.

[3] In reply to the objection that the ordinance was discriminatory the court quoted the following: "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting and even requiring their separation in places where they are liable to be brought in contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power." Plessy *v.* Ferguson, 163 U. S. 537.

[4] State *v.* Darnell, 166 N. C. 300, 81 S. E. 338.

[5] In disposing of this argument the Supreme Court of the United States in Plessy *v.* Ferguson, *supra*, said: "The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class." See also, Berea College *v.* Comm., 123 Ky. 209, 94 S. W. 623, 124 Am. St. Rep. 344, 13 Ann. Cas. 337; Harris *v.* City of Louisville, 165 Ky. 559, 177 S. W. 472.

disponendi incident to the ownership of property; that it would prohibit one owning property in a block where the majority of the residents were of the other race from occupying his own property; that it might cause many of the best negroes to move from the state; and finally held that "an act of this broad scope so entirely without precedent in the public policy of this state, and so revolutionary in its nature, cannot be deemed to have been within the purview of the legislature from the use of the words conferring authority to make ordinances for the general welfare." The court refused to say whether the legislature could pass a similar statute which would be valid.

The council of Atlanta passed an ordinance forbidding members of one race from moving into a block occupied by members of the other race, and further prohibiting a member of one race from moving into any house located on a mixed block which house was previously occupied by a member of the other race where members of the other race are still living in the adjoining houses, *without the consent of such adjoining residents.* The ordinance further provided for the determination by the majority of the property owners on vacant blocks of the question as to which race should occupy such block. It contained a clause making the ordinance operative not upon present ownership and occupancy but only as to future changes. After the passage of the ordinance a colored person purchased a house in which a white person was residing and which was situated on a block occupied by both races. At the instance of a white person residing in an adjoining house he was notified by the police that the ordinance would be enforced against him or any other colored person attempting to occupy the house. Whereupon he sought to adjoin the enforcement of the ordinance. The court argued that under the provisions of this clause "an owner of property could, by mere force of the ordinance and caprice of an adjoining proprietor, without any compensation or process of law, be deprived for all time of the right to reside on his property, or to substitute a tenant or grantee to do so;" but unfortunately went on to distinguish this ordinance from the statutes providing for the separation of the races in railroad cars and public schools on the ground that those laws merely required the members of each race to conform to reasonable rules of personal conduct in regard to separation of the races, while this ordinance denied property owners the right to use, control and dispose of their property, and finally held it void on the ground that such an interference with private property rights was contrary to the due process clause of the federal Constitution.[6] In an excellent opinion Judge Lumpkin criticised the court's tendency to go to the extreme in protecting private property rights;[7] and its apparent disregard of the idea of

[6] Carey *v.* City of Atlanta (Ga.), 84 S. E. 456.

[7] In a specially concurring opinion, Judge Lumpkin said: "It seems to me that the discussion in regard to the right to use property as an incident to ownership may lead to extreme results. The right of an

classification in regard to the use of property; but concurred in holding the ordinance void upon what seems to be the true ground, viz: that it delegated to individuals the right to say how plaintiffs should use their property. It would seem that Judge Lumpkin's criticism of the principal opinion is very well taken, since it is perfectly well settled that the use of private property can be reasonably restricted in the exercise of the police power;[8] and that the due process clause of the Fourteenth Amendment does not limit the exercise of the police power.[9]

The next ordinance to be considered was passed by the city council of Louisville, Kentucky. It prohibited members of one race from moving into a block in which the majority of the residences were occupied by members of the other race and provided for the determination of the character of the occupancy of vacant blocks by the persons owning a majority of the property on such block. It contained a clause protecting all rights vested at the time of its passage; and was also a great improvement over the ordinances already considered in that it contained a clause providing a method of recording the character of occupation in each block from time to time.[10] In an excellent opinion the Supreme Court of Kentucky held,[11] first, that the ordinance did not unduly interfere with property rights;[12] secondly, that it did not violate the Fourteenth Amendment by preventing the residence of the negroes in the more desirable portions of the city;[13] and thirdly, that in

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owner to use his property is important, but it is not so absolute that he may, at all times and under all circumstances, use it as he pleases, regardless of the public welfare, morals, or safety. The statute books contain many laws restricting the use of property by the owner of it, and prohibiting him from using it for certain purposes."

[8] See *post*, note 12. See also, Harris *v.* City of Louisville, *supra.*

[9] Fertilizer Co. *v.* Hyde Park, 97 U. S. 659; Mugler *v.* Kansas, 123 U. S. 623; L'Hote *v.* New Orleans, 177 U. S. 587.

[10] In State *v.* Gurry, *supra,* the court said: "A practical difficulty in the enforcement of sections one and two which occurs to us, is the lack of any provision in the ordinance for some sufficient public notice of what blocks are affected,—which are to be white and which colored. Unless there be some record giving the necessary information, there would probably be great confusion in the examination of title and passing on the right of purchasers, even if no difficulties arise in the enforcement of such sections."

[11] Harris *v.* City of Louisville, 165 Ky. 559, 177 S. W. 472.

[12] In disposing of the *jus disponendi* the court said in part: "The *jus disponendi* has but a little place in modern jurisprudence. The advance of civilization and the consequent extension of governmental activities along lines having their objective in better living conditions, saner social conditions, and a higher standard of human character has resulted in a gradual lessening of the dominion of the individual over private property and a corresponding strengthening of the regulative power of the state in respect thereof, so that today all private property is held subject to the unchallenged right and power of the state to impose upon the use and enjoyment thereof such reasonable regulations as are deemed expedient for the public welfare."

[13] The court said: "If such separation should result in the members of the colored race being restricted to residences in the less desirable portions of the city, they may render those portions more desirable through their own efforts, as the white race has done."

view of the public policy of the state to secure the separation of the races it was a valid exercise of the police power of the municipal legislature. It is important to note that the validity of the clause providing for the determination of the character of the future occupancy of vacant blocks was not before the court, and the court very properly refrained from discussing it.

The latest case on the question is the case of *Hopkins* v. *City of Richmond* (Va.), 85 S. E. 139. The ordinance before the court here prohibited members of one race from moving into blocks in which the majority of the houses were occupied by members of the other race; and required persons applying for permits to build on vacant lots to state in their application whether the houses were intended to be occupied by white or colored people, but did not require any agreement of the other property holders as to the character of future occupancy. There was no clause protecting vested rights; but the rights which were concerned in the case did not accrue until after the enactment of the ordinance, and the court held that although the ordinance was invalid in so far as it prohibited property owners from occupying for their own use property which they owned prior to the passage of the ordinance, yet it was valid as to all rights accruing after its passage. Subsequent to the passage of the ordinance a general act was passed by the legislature authorizing cities to pass ordinances providing for segregation of the races; but the court said that independently of this general statute the municipality had authority to pass such an ordinance in exercise of its general police power. It further said that the ordinance did not constitute a delegation of authority to residents and lot owners, since its operation depended not upon the consent of such owners but upon the fact of residence or ownership in the various blocks at the time that the ordinance took effect; that the ordinance constituted a reasonable exercise of the police power; and that it did not violate any provision of the Fourteenth Amendment.

The general result of the cases and of the great amount of discussion in legal periodicals [14] as to the validity of these ordinances may be summarized as follows: (1) It is well settled that they are not discriminatory. (2) Their purpose is within the reasonable limits of the police power. (3) By the great weight of opinion they do not constitute an unreasonable restraint upon the right of alienation. (4) If they fail to protect property rights vested at the time of their passage, and especially the right of an owner of property to occupy it for his own personal use, they are unreasonable and invalid.[15] (5) If properly drawn so as to protect vested

[14] See citations of authorities in note 1, *supra*.

[15] It is interesting to note that all the cases that have been decided have involved only rights arising after the passage of the ordinance; but that in the three cases in which the ordinances were held invalid the courts were influenced by the fact that rights already vested would be affected. In one of the cases in which the ordinances were held valid, it contained full protection of vested rights; and in the other

rights, and not contrary to the public policy of the state, these ordinances are, by what seems to be the better opinion, within the scope of the power of a municipality to provide for the general welfare of its citizens. (6) It has been objected that those clauses in some of the ordinances which provide for the determination of the character of occupancy in a vacant block according to the wishes of the majority of the property owners on the block are void as constituting a delegation of authority to individuals; but this question has not been properly brought before the courts and is still undecided.[16]

CIRCUMSTANCES NECESSARILY ATTENDANT TO CONSTITUTE DURESS OF PROPERTY.—Formerly the effects which threats of the destruction or loss of his property might produce upon the mind of a man of ordinary firmness was not considered sufficient to destroy the voluntary character of acts done under such influence.[1] Yet it is probable that a wider credence is now given to the narrowness and severity of the rule of ancient times than the old cases justify.[2] Whatever the old rule may have been it is well settled now that jeopardy of a man's property may make him submit to the less of two evils and rob a transaction of its voluntary character.[3] While it is not permitted that a man choose to give away his money or take his chance whether he is giving it away or not, and change his mind afterwards, yet it is open to him to show that he supposed

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court, by a remarkable piece of construction held that the ordinance was divisible as to its retroactive and future operation, and that it was invalid as to its retroactive operation but valid as to its future operation.

It would seem that a failure to protect vested rights would invalidate an ordinance because, being unreasonable, it would not be valid exercise of the police power, and would, therefore, constitute a deprivation of property without due process of law. While the Fourteenth Amendment imposes no restriction upon the police power (see cases cited in note 9, *supra*); yet the legislation must be reasonable in order to constitute an exercise of the police power.

[16] However the validity of a similar provision was involved in the case of Cary *v.* City of Atlanta, *supra*, and has been discussed in connection with that case.

[1] "My Lord Coke says that for menace in four instances a man may avoid his own act: 1. For fear of loss of life; 2. For fear of loss of a member; 3. Of a mayhem; 4. Of imprisonment. But menacing to commit a battery, or burn his house or spoil his goods is not sufficient to avoid the act; for if he suffer what is threatened he may sue and recover damages in proportion to the injury done him." Bac. Abr., tit. Duress, A. Skeate *v.* Beale, 3 P. & D. 597, 11 A. & E. 983.

In Skeate *v.* Beale, 11 A. & E. 983, 990, Lord Denman said: "* * * but the fear that goods may be taken or injured does not deprive anyone of his free agency who possesses that ordinary degree of firmness which the law requires all to exert."

[2] Wakefield *v.* Newbon, 6 Q. B. 277, 280, 13 L. J. Q. B. 258. In this case Lord Denman, C. J., speaking of Skeate *v.* Beale, said: "It was by no means unsupported by some ancient authorities; but perhaps it was laid down in terms too general and extensive."

[3] Green *v.* Duckett, 11 Q. B. D. 275; Swift *v.* United States, 111 U. S. 22.